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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

GEORGE WILLIAM SCALLY,

Defendant and Appellant.

E057024

(Super.Ct.No. FSB1104558)

OPINION

APPEAL from the Superior Court of San Bernardino County. J. David Mazurek,
Judge. Affirmed.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Barry Carlton, and Teresa
Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Defendant George William Scally appeals his conviction for second degree robbery (Pen. Code, § 211;¹ count 1) as the getaway driver in a robbery. The jury also found true allegations that defendant had two prior strike convictions (§ 667, subds. (d) & (e)(2)(A)) and a prior serious felony conviction (§ 667, subd. (a)). The trial court sentenced defendant to 30 years to life in prison. Defendant appeals the judgment, contending the trial court abused its discretion in denying his *Romero*² motion, requesting the court to strike one or both of his prior convictions under the Three Strikes law. We conclude there was no abuse of discretion and affirm the judgment.

II

FACTS

On September 29, 2011, around 10:15 a.m., Michael Avington walked into Advanced America, a check cashing store in Redlands. Stephanie Guerrero was working there at the time. After Guerrero explained to Avington the cash-advance process, Avington pulled out a gun and told Guerrero he was committing a robbery. He then told Guerrero to remove the money from her drawer and put it in his black, drawstring bag. After she did this, Avington told Guerrero to open a second drawer, which she did.

¹ Unless otherwise noted, all statutory references are to the Penal Code.

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530 (*Romero*).

Guerrero removed from the two drawers a total of \$350, which she put in Avington's black bag. The cash included three \$100 bills.

Avington next ordered Guerrero to go to the safe in the back of the store, open it, and remove its contents. Guerrero removed from the safe some money and a "bait bag," and placed them in Avington's black bag. The bait bag contained a prepaid Visa card, fake deposit slips, and \$100, consisting of 60 prerecorded \$1 bills and 2 prerecorded \$20 bills. After confirming there was nothing left in the safe, Avington ran out of the store. Guerrero hit the panic button and called 911.

The robbery was recorded on Advanced America store's surveillance cameras and the video was shown to the jury. During the trial, Guerrero identified Avington as the person who robbed her.

Cheryl Slaton testified that around 10:00 a.m., she was at a recycling center in the Stater Bros. shopping plaza where the Redlands Advanced America store was located. Slaton saw a black SUV with a handicap license plate parked along the curb, nearby. The engine was running and the driver's window was open. Slaton noticed the driver was a Black male with cornrows in his hair. Slaton heard someone running and looked toward the SUV. She saw a person dive into the back seat of the SUV. The SUV then sped away, behind the Stater Bros. market. A surveillance video from behind the Stater Bros. market showed a black SUV driving behind the store at 10:14 a.m.

Slaton wrote down the license plate number of the SUV on her cell phone (69847ZP). The number was slightly different from defendant's SUV license plate

number (6984ZDP). At a photographic lineup, Slaton identified defendant as the driver of the SUV but was unable to identify him in court.

After the robbery, around 6:50 p.m., on September 29, 2011, Redlands police officers spotted a black SUV with a handicap license plate. The car was registered to an individual with the last name of Scally. The license plate number (6984ZDP) was similar to the number Slaton had written down. About an hour later, the police stopped the SUV. Defendant, whose hair was braided, was in the front passenger's seat. Avington was in the rear right passenger seat. Rachelle Scally was in the driver's seat. The police searched defendant and found him in possession of \$424.03, which included six \$20 bills and three \$100 bills. One of the \$20 bills matched the serial number of one of the prerecorded \$20 bills from the bait bag.

The police searched defendant's apartment in Redlands and found a black nylon overnight bag containing clothing matching the description of clothing Avington was seen wearing during the robbery, a revolver, bullets, the Visa card taken during the robbery, a plastic deposit bag from Advanced America, and \$341 in cash. Sixty of the \$1 bills from the black nylon bag matched the serial numbers on the bait money.

III

ROMERO MOTION

Defendant contends the trial court abused its discretion by denying his *Romero* motion to strike one or more of his prior strike convictions under section 1385.

Defendant argues that, based on the totality of the circumstances, the trial court should have deemed defendant outside the Three Strikes sentencing scheme's spirit. Defendant

claims that, by denying the motion, the trial court ignored his nonviolent conduct in the instant case, sentence proportionality, the interests of society, and defendant's efforts to lead a law-abiding life. We disagree. There was no abuse of discretion.

Under section 1385, subdivision (a), the trial court has discretion to strike a prior felony conviction allegation in furtherance of justice. (*Romero, supra*, 13 Cal.4th at pp. 529-530.) In order to do so, the court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

We review the trial court's refusal to strike a prior felony conviction under section 1385 for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) The defendant bears the burden of establishing that the trial court's decision was unreasonable or arbitrary. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978 [presumption that trial court acts to achieve lawful sentencing objectives].) "Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, . . ." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) "[I]t is not enough to show that reasonable people might disagree about whether to strike one or more' prior conviction allegations." (*Carmony*, at p. 378.) "[A] trial court does not abuse its

discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at p. 377.)

Defendant filed a written *Romero* motion to dismiss his prior strike convictions, claiming he fell outside the spirit of the Three Strikes law because his strike convictions occurred in 2000 and his subsequent drug possession conviction in 2004 and conviction in 2006 for driving under the influence, were of decreasing seriousness. His two felony convictions in 2000 were for assaults committed for the benefit of a street gang (§§ 245, subd. (a)(2), 186.22, subd. (b)(1)(c)). Defendant asserts that his involvement in the current case was relatively minor, since the robbery charge is based solely on defendant being the getaway driver. His involvement in the crime was limited to being an aider and abettor. Defendant further claims he has matured since his prior strike convictions. At the time of the charged offense, he was 34 years old, had moved away from his previous gang’s territory, had married, was employed, and was supporting two children. He also had been volunteering to help at-risk children, was living a law-abiding life, and had been crime free for three years, since his release in 2009. Defendant argued that, under the totality of these circumstances, his 30-year-to-life sentence was excessive and disproportionate.

The trial court acknowledged defendant had been crime free for three years but denied defendant’s *Romero* motion based on defendant’s criminal history and the nature of the current offense. This was not an abuse of discretion because the charged offense of robbery was a serious violent felony, in which defendant’s companion used a gun to commit the robbery. In addition, defendant’s criminal history included assault with

firearms for the benefit of a gang. Defendant also had violated parole twice, and had already benefitted from the court previously dismissing his strikes when he was sentenced for drug possession in 2004. A little over two years after defendant's release in June 2009, defendant participated in the charged crime. Defendant had not been a model citizen. After a relatively brief period out of prison, he returned to a life of crime by assisting Avington in committing the violent crime of armed robbery. Under these circumstances, we cannot say the trial court abused its discretion in finding defendant fell within the spirit of the Three Strikes law, and denying defendant's *Romero* motion to dismiss one or more of his prior felony convictions.

IV

DISPOSITION

The judgment is affirmed.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

KING
J.